

ESTTA Tracking number: **ESTTA454759**

Filing date: **02/03/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91203180
Party	Defendant Tencent Holdings Limited
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Date	02/03/2012
Attachments	2012-02-03 Tencent - Motion to Dismiss.pdf (6 pages)(226328 bytes)

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TRAVIAN PUBLISHING GMBH,)	
)	Opposition No.: 91203180
)	Serial No. 85391746
Opposer,)	Mark: BATTLEZEN
)	
v.)	
)	
TENCENT HOLDINGS LIMITED,)	
)	
Respondent.)	
)	

**APPLICANT'S MOTION TO DISMISS NOTICE OF OPPOSITION
AND MEMORANDUM OF LAW**

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 503, Applicant Tencent Holdings Limited ("Applicant"), through its counsel, hereby submits this motion to dismiss the Notice of Opposition (the "Notice") filed by Travian Publishing GmbH ("Opposer"). Because Opposer has failed to state a claim upon which relief may be granted, Applicant's motion should be granted.

I. STATEMENT OF FACTS

On August 8, 2011, Applicant filed application serial no. 85391746 for the mark BATTLEZEN in International Class 41 (the "Application"). The Application was published for opposition on November 29, 2011, with the opposition period closing on December 29, 2011. Opposer filed the Notice on December 28, 2011, opposing the Application in its entirety.

Opposer submitted the Notice using the Electronic System for Trademark Trials and Appeals ("ESTTA") system. The Notice consists of a populated ESTTA form and an electronic submission in the

form of a single-spaced, two-page letter addressed to the Board.¹ Under the field “Grounds for Opposition” in the ESTTA form, Opposer has entered “false suggestion of a connection” pursuant to “Trademark Act section 2(a)” and “Priority and likelihood of confusion” pursuant to “Trademark Act section 2(d).” The Notice cites no U.S. trademark registration owned by Opposer and does not claim any use of a mark by Opposer in the U.S. or elsewhere.

II. THE LEGAL STANDARD

For the purposes of determining a motion to dismiss for failure to state a claim on which relief may be granted, all of Opposer’s well-pleaded factual arguments must be accepted as true, and the complaint must be construed in the light most favorable to Opposer. *See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 U.S.P.Q.2d 1038, 1041 (Fed. Cir. 1993). Dismissal for insufficiency to state a claim is appropriate when it appears certain that an opposer is entitled to no relief under any set of facts which could be proven in support of its claims. Here, “[O]pposer has not pleaded facts which, if proved, would establish grounds for refusing registration to [A]pplicant.” *See Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 U.S.P.Q.2d 1711 (T.T.A.B. 1993).

III. ARGUMENT

a. Opposer Has Failed to State a Claim under Trademark Act Section 2(a)

The Notice contains no factual allegations to support a claim for “false suggestion of a connection” pursuant to Section 2(a) of the Trademark Act. That section bars registration of a mark which:

Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or

¹ Opposer’s use of single-spaced text alone merits dismissal because “text in an electronic submission *must* be in at least 11-point type and double spaced.” *See* 37 C.F.R. § 2.126(b); TBMP § 309.01 (emphasis added).

spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act) enters into force with respect to the United States.

15 U.S.C. § 1052(a).

The Notice fails to set forth facts that relate to any of the characteristics enumerated in Section 2(a) of the Trademark Act, let alone concern any “false suggestion of a connection.” In the Notice, only paragraph numbers 4 (beginning with “On August 8, 2011”), 5 (beginning with “The trademark the applicant seeks”) and 6 (beginning with “In detail: Both aforementioned trademarks”) of the letter contain allegations concerning the Application.² Paragraph number 4 is devoted entirely to the prosecution history of the Application; no Section 2(a) allegations are introduced. Paragraph numbers 5 and 6 allege facts exclusively relevant to the claim of likelihood of confusion; again, no allegations relating to Section 1052(a) are mentioned. None of the allegations in the Notice remotely speak to how Applicant’s mark concerns “matter which may . . . falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols.” See 15 U.S.C. § 1052(a). Therefore, the Notice in its entirety is devoid of any allegations that address any facts which must be present to deprive a mark of registration based on a “false suggestion of a connection” pursuant to Section 2(a) of the Trademark Act.

b. Opposer Has Failed to State a Claim under Trademark Act Section 2(d)

In order to prevail in an opposition based on a likelihood of confusion pursuant to 2(d) of the Trademark Act, an opposer must establish that the challenged application:

Consists of or comprises a mark which so resembles *a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another* and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

² The paragraphs in the Notice are not numbered. Applicant is treating the paragraph beginning with “We oppose the registration” as paragraph number 1, the following paragraph as paragraph number 2, etc.

15 U.S.C. § 1052(d) (emphasis added). Here, Opposer appears to base its likelihood of confusion claim on purported trademark rights in the mark BATTLEMONS. However, such rights—to the extent there are any—fall short of the minimal requirements as set forth in Section 2(d) of the Trademark Act. First, the only U.S. trademark filing put forth as the basis for the opposition is an application for the mark BATTLEMONS (serial no. 79097773).³ Because Section 1052(d) requires that the U.S. filing be a registration and not a mere application, Opposer’s U.S. trademark filing as pleaded and at the time of filing the Notice is an insufficient basis for establishing a likelihood of confusion.⁴ Second, Opposer fails to allege in the Notice any use of a mark in the U.S. As a result, the Notice omits facts required for establishing any likelihood of confusion.

IV. CONCLUSION

For the foregoing reasons, the Notice fails to allege facts which, even if proved, would entitle Opposer to prevail on any of the claimed grounds. Applicant respectfully requests that the Board accordingly dismiss the opposition on the grounds that Opposer has failed to state any claim upon which relief may be granted.


³ The Notice claims Opposer’s ownership of international registration no. 1078443 for the mark BATTLEMONS, but this does not constitute a mark “registered in the United States Patent and Trademark Office.”

⁴ After the filing date of the Notice and the close of the opposition period, application serial no. 79097773 matured to registration. Once again, the relevant consideration is the status of Opposer’s trademark filing at the time of the filing of the Notice.

Dated: February 3, 2012

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
A Professional Corporation

A handwritten signature in dark ink, appearing to be 'AH', is written over a horizontal line.

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Matthew J. Kuykendall

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CERTIFICATE OF SERVICE BY MAIL

I, Lisa M. Ruiz, declare:

I am employed in Santa Clara County. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050.

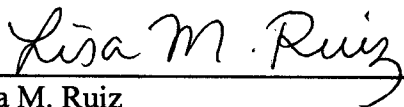
I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence would be deposited with the United States Postal Service on this date.

On this date, I served the **MOTION TO DISMISS** on the recipient listed below, by placing the document described above in envelopes addressed as indicated below, which I sealed. I placed the envelopes for collection and mailing with the United States Postal Service on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

Travian Publishing GmbH
Wilhelm-Wagenfeld Str 22
Munich, 80807
Germany

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Palo Alto, California on February 3, 2012.



Lisa M. Ruiz